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IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 260 #3

UNITED STATES OF AMERICA ex rel. RICHARD EICHENLAUB,
Petitioner,

against

W. FRANK WATKINS, as District Director of Immigration and Naturalization of the United States for the District of New York, or such person, if any, as may have the said RICHARD EICHENLAUB in custody,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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No.

UNITED STATES OF AMERICA, ex rel. RICHARD EICHENLAUB,

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W. FRANK WATKINS, as District Director of Immigration and Naturalization of the United States for the District of New York, or such person, if any, as may have the said RICHARD EICHENLAUB in custody,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Richard Eichenlaub, petitioner above named, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit unanimously affirming the order of the United States District Court for the Southern District of New York dismissing a Writ of Habeas Corpus.

Opinions Below

The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 167 Fed. (2d) 659. It is printed as Appendix I hereto. The opinion of the District Court is set forth (R. 14). The judgment of affirmance of the Circuit Court of Appeals was entered on May 3, 1948.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. 347).

Statutes Involved

The statutory provisions involved herein are part of the Immigration Act of May 10, 1920, c. 174, 41 Stat. 593 (8 U. S. C. 157), and Title 18, Section 88 of the United States Code.

Reference is made in the opinions below to the Act of June 15, 1917, c. 30, Title 8, 40 Stat. 226 (22 U. S. C. 233), and the Act of March 28, 1940, c. 72, 54 Stat. 80 (22 U. S. C. 601), but it is contended that they were wrongly applied and do not properly concern this petitioner

Questions Presented

1. Whether the special deportation statute here involved, Act of May 10, 1920, extends to the offense referred to in the first count of the indictment to which the petitioner pleaded guilty.

2. Whether there was a complete failure to prove that petitioner's conviction rested on the 1917 Act apart from

the 1938, 1939 and 1940 Acts relating to espionage and/or non-registration of agents of a foreign government, so as to render the conviction invalid and no basis for deportation.

3. If the first count of the indictment, to which the petitioner pleaded guilty, is not so vague and uncertain as to create serious doubt that the petitioner was even charged with violating any section enumerated in the Act of May 10, 1920, conviction of which would make the petitioner subject to deportation.

4. Whether a judgment of denaturalization may be entered by default on consent of the petitioner without a hearing.

5. Whether in the circumstances of this case the petitioner's conviction was the conviction of an alien within the meaning of the Act of 1920.

6. Whether the warrant of deportation contains lawful ground of deportation.

Statement of Facts

The petitioner was lawfully admitted into the United States in February, 1930. He became a citizen of the United States on November 17, 1936. He is married and his wife is a resident of the United States. At present the petitioner is in the custody of the United States Immigration Service and is held on Ellis Island subject to deportation. He was placed on parole on July 29, 1948, pending the outcome of this proceeding.

On January 2, 1942, the petitioner was sentenced by the United States District Court for the Eastern District of New York for a term of imprisonment for eighteen months following his plea of guilty to one of two counts of an indictment charging him with violation of Section 88, Title 18 of the United States Code.

On August 13, 1943, an action was instituted in the United States District Court for the Southern District of New York to cancel the denaturalization certificate of the petitioner on the ground of fraud. On January 25, 1944, upon the consent of the petitioner, a judgment was entered in the said Court cancelling his American citizenship.

Thereafter deportation proceedings were instituted against the petitioner. An order was made therein recommending that the petitioner be deported to Germany. An appeal therefrom was taken to the Board of Immigration Appeals which directed deportation on the following charge:

> "The Act approved May 10, 1920, in that, he has been found to be a member of the undesirable classes of alien residents enumerated in Section 1 of said Act, to wit: An alien who since August 1, 1914, has been convicted of conspiracy (18 USC 88) to violate a part of an act entitled 'An Act to punish acts of interference with the foreign relations, the neutrality and the foreign commerce of the United States, to punish espionage, and better, to enforce the criminal laws of the United States, and for other purposes', approved June 15, 1917 (22 U. S. C. 232)."

A warrant of deportation was issued on October 9, 1945, directing that the petitioner be deported (R. 2). The petitioner thereafter applied for a Writ of Habeas Corpus on the grounds that the warrant of deportation was based on an erroneous construction of Section 157 of Title 8, U. S. C., the deporting statute, in that said statute does not provide for the deportation of the petitioner and that the petitioner is therefore illegally detained, imprisoned and restrained of his liberty.

Although the writ was granted by Honorable William Bondy, U. S. D. J., the petitioner was brought before and the matter was heard by Honorable Samuel Mandelbaum of the same Court, who dismissed it with a written opinion (R. 14).

From the order of dismissal the petitioner appealed to the Circuit Court of Appeals, Second Circuit. The order appealed from was affirmed by a written opinion (Appendix I).

The respondent's return seeks to attribute to the petitioner Eichenlaub (the owner of a restaurant frequented by one or two customers later found to be trained undercover operators for the Reich) some guilty knowledge of violation of several penal statutes with which he was in nowise connected and to which he did not plead guilty.

The petitioner Eichenlaub pleaded guilty to the first count only of the indictment, which charged a conspiracy under U. S. C., Title 18, Section 88, and an overt act involving him in the alleged system and organization operated in the United States for the purposes of obtaining, collecting and receiving information of a military, naval, commercial or industrial nature, and data concerning the movement and description of cargo ships of American and foreign registry. The said overt act consisted of a conference he had with an individual named Eberling on June 10, 1941, within a month of the time when he was indicted and several months prior to the commencement of the war between the United States and Germany.

The petitioner, who had no criminal record prior to the conviction on a plea of guilty to the above count, which was the lesser of the two counts in the indictment, had as the only alternative the matter of standing trial with thirty-two other defendants, some of whom were alleged to be in communication with the enemy by radio, on a sweeping conspiracy charge of espionage. Subsequent developments at that trial served to reveal how some of the defendants, notably the petitioner Eichenlaub, were innocent sources of information used by trained and clever undercover agents operating in this country as mediums for procuring isolated data later assembled by ingenious methods to convey intelligence to foreign central intelligence headquarters.

The said conspiracy charge was well analyzed by the Circuit Court of Appeals for the Second Circuit in an opinion written on November 8, 1945, upon an appeal taken by one of the thirty-three defendants who stood trial and was convicted and sentenced after Mr. Eichenlaub's plea, at which time the Court discussed at considerable length the very underhanded and surreptitious devices to which that appellant, one Heine, resorted to deceive and conceal from those with whom he associated or from whom he obtained information his real intentions and purposes. See *United States* v. *Heine*, 151 F. (2d) 813.

To attribute "undesirability", "deportability", "moral turpitude" or any felonious purposes to the petitioner on the basis of his plea to a statutory conspiracy charge on which he received the lightest sentence imposed on any of his co-defendants is to revert to the hysteria of those first Pearl Harbor days during which the jury who tried most of those indicted with him was stampeded into rubber stamping all the defendants before them as guilty of everything charged, and is to disregard the sane judicial standards which the appellate courts have since laid down.

Assignment of Errors

The Circuit Court of Appeals erred:

1. In affirming the order dismissing the writ.

2. In upholding the sufficiency of Count 1 of the indictment to which the petitioner pleaded guilty, although it failed to state facts sufficient to constitute an offense involving moral turpitude within the contemplation of 8 U. S. C. 157.

3. In holding that the conviction under Count 1 of the indictment was for a crime enumerated in 8 U. S. C. 157.

4. In holding that a judgment cancelling petitioner's citizenship on consent should not have been entered without presentation by the Government of clear and unequivocal ex parte proof to support the complaint.

5. In upholding the validity of the petitioner's decree of denaturalization and holding that the said decree relates back for the purpose of making the petitioner an alien when convicted.

6. In failing to remand the case although the warrant of deportation did not state that a finding had been made that the petitioner individually was an undesirable resident as required by the Act of 1920.

Reasons for Granting the Writ

1. The reference in the indictment to Title 22, U. S. C. 233, confuses and misstates the nature of the charge to which relator pleaded,

2. The basic purpose and principle of Section 233, in Chapter 5, concerning preservation of friendly foreign relations, is so utterly different from Section 601 and following sections, in the new Chapter 11, concerning foreign agents and propaganda, that regardless of the similarity of language between them, the first count of the indictment, to which Mr. Eichenlaub was persuaded to plead guilty, should now, in the light of all the circumstances, be vacated as void or so grossly misleading as to require that the Court set it aside.

3. Even prior to the rule of the *Heine* case the petitioner's plea to the first count of the July, 1941 indictment clearly did not imply guilt of espionage, for acts against this nation's official guests (diplomats, consuls, etc.) however rude or prohibited are entirely distinct from spying.

4. The judgment of denaturalization is void for the reason that Section 738 of Title 8, U. S. C., does not provide for the revocation of naturalization by consent.

5. The judgment of denaturalization is void for the reason that said judgment does not comply with the Rules of Civil Procedure.

6. A proceeding to cancel a certificate on the ground of fraud is a suit in equity and the burden of proof is on the prosecution to establish and prove its case.

7. In a proceeding to cancel a certificate of naturalization on the ground of fraud the Government must present evidence of a clear, unequivocal and convincing nature.

8. The Court lacked jurisdiction to enter a judgment of denaturalization.

9. The petitioner's conviction was not the conviction of an alien within the meaning of the Act of 1920.

10. Under proper circumstances a judgment cancelling citizenship can be vacated and set aside, and time should not act as a barrier in the instant case.

11. The warrant of deportation contains no lawful ground of deportation.

Prayer for Writ

WHEREFORE, your petitioner prays for a writ of certiorari to be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court a complete transcript of the record and all proceedings in the instant cause, so that this cause may be reviewed and determined by this Court, and that the judgment of the United States Circuit Court of Appeals for the Second Circuit may be reversed and that the petitioner may be granted such other and further relief as may seem proper.

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BRIEF IN SUPPORT OF PETITION

POINT I

The reference in the indictment to Title 22, U. S. C. 233, confuses and misstates the nature of the charge to which relator pleaded.

Nothing that the Grand Jurors accused the petitioner of doing comes within the purview or scope of any activities for which any person should have registered, or any activities which any person would have been licensed to carry on had he registered, or in the language of the Act of 1917, any activities of which any person should have given "prior notification to the Secretary of State".

The Act of 1917, *the official citation of which is Title VIII, 40 Stat. 226,* was entitled "DISTURBANCE OF FOREIGN RELATIONS", and related largely to conflicts between a foreign government and the United States, whereas in July and September, 1941 we had not become involved in the war. This entire law was obviously designed to protect official representatives of foreign governments in the United States, and not to proscribe or limit the freedom of expression of persons in this country *when addressing arguments or propaganda to our general public.* Subsection 3 of this Act clearly relates to impersonating diplomatic or consular officials and the confusion which is caused if we take the United States Code Annotations without carefully analyzing the historical sequence thereof can readily be understood when we look at the Act of June 8, 1938, the Act of August 7, 1939 and the Act of April 29, 1942, which the Code annotators relate back to this subsection of the 1917 law—in spite of the fact that the declared *"policy and purpose"* of the later Acts is entirely different.

The Act of June 8, 1938, *the official citation of which is 52 Stat. 653,* was entitled "REGISTRATION OF CERTAIN PERSONS EMPLOYED BY AGENCIES TO DISSEMINATE PROPAGANDA". Under this law provision was made for a very elaborate and formal sequence of registration statements and periodic activity accounts which had no connection whatsoever with the activities of criminally-minded spies or persons impersonating diplomatic officials. These registration laws were designed to advise the public of the identity, associations and employment contacts of those who were speaking, writing or addressing to the American public arguments on behalf of some foreign nation. They applied to such persons as the Honorable John W. Davis, former Democratic candidate for President and distinguished New York lawyer, who registered thereunder as a British agent. They have nothing to do with either spies or persons falsely impersonating officials.

The Act of August 7, 1939, *the official citation of which is 53 Stat. 1244,* is an amendment of this propaganda registration Act of 1938, clarifying some of its provisions but continuing the same "policy and purpose" of disclosing the background of writers and speakers who were acting for disclosed foreign principals. It is noteworthy that the Act of June 8, 1938 was passed a year before the outbreak of the German-Polish or general European conflict, and the amendment under date of August 7, 1939 was passed a month before the outbreak of those hostilities.

More than four months after our entry into the war the Act of April 28, 1942 was adopted, *the official citation of which is 56 Stat. 248-256.* Although it purports to carry out the "policy and purpose" of the 1938 Act as amended, it is a much more voluminous and detailed bit of legislation, and whereas the section to which reference is made in the indictment as U. S. Code, Title 22, Section 233, is less than fifty words long, this 1942 Act is between 5,000 and 6,000 words in length, covers nine large pages in the official publications, and when printed separately constitutes a voluminous document.

The petitioner is a simple man of limited education and understanding. It is significant that whereas he pleaded guilty several months before the war to an elaborately phrased and ingeniously worded indictment, which he obviously could not understand, the fourteen-week trial of those indicted as alleged co-conspirators was not concluded until four days after Pearl Harbor, right at the height of the tension and excitement of that period, and he was not sentenced until January 2, 1942. The language of the warrant of commitment issued in his case reveals that the prosecutors or those who phrased the statements of the offenses for which the petitioner and others were sentenced were confusing the thinking and emotions of the European war era and reading into these peacetime statutes espionage undercurrents entirely foreign to their "policy and purpose".

POINT II

The basic purpose and principle of Section 233, in Chapter 5, concerning preservation of friendly foreign relations, is so utterly different from Section 601 and following sections, in the new Chapter 11, concerning foreign agents and propaganda, that regardless of the similarity of language between them, the first count of the indictment, to which Mr. Eichenlaub was persuaded to plead guilty, should now, in the light of all the circumstances, be vacated as void or so grossly misleading as to require that the Court set it aside.

Only a defendant whose constitutional rights had never been explained to him could have been persuaded to plead guilty to such a hybrid count, and it is respectfully submitted that this is one of those cases where the Court should look behind the plea, especially when the error is so obvious on the face of the indictment.

The voluminous indictment in this case, with its 19-page first count and 12-page almost equally incoherent second count, is defective in so far as it endeavors to charge a crime, both because it was carelessly prepared and because the evidence offered to support the charge, could only offend our own public and administration, if indeed it was criminally offensive at all.

The error in basing the charge on the altered and transferred Section 233 is one which goes right to the heart of the alleged offense and not merely one which may be corrected by tracing or analyzing the history of the law.

Title 22 of the United States Code, unlike Titles 1, 3, 4, 6, 9, 17, 26, and presently 18 and 28, is not an "official" codification, and whoever drafted the indictment ought to have checked his facts, and once he found a paragraph or series of paragraphs to suit his plans he should have quoted them in order to fairly inform the accused of the charge being made against him. Even if the statute relied upon were quoted in full, a better-expressed indictment could have been presented in half the number of pages which were used for the repetitious, alias-studded arrangement of formal phrases which were coherent only to someone who is initiated in the secondary meanings of certain statutory phrases and that double-talk jargon which courts have so often emphasized was designed apparently to confuse rather than to inform any layman or juror and most lawyers.

That the indictment is the work of a prosecutor and grand jury which were hopelessly confused as to the meaning they tried to express by stringing together copybook phrases is perfectly evident inasmuch as it would be impossible to violate Section 233 of Title 22 of the United States Code "in the manner and means set forth", either in the indictment or at the trial.

Since the indictment sought to charge espionage, certainly some *spy* statute should have been used rather than the Don't Disturb Diplomats Act or the Be Honest About Your Propaganda Backgrounds Act.

In 1917 Congress passed twelve separate, distinct and independent Acts (40 Stat. 231). The second of these twelve Acts related to proclaiming national emergencies; the fifth to enforcing neutrality, and the eleventh to search warrants. In addition to these three affirmative Acts, the nine other negative Acts related to such diverse subjects as I. Espionage, III. Injuring Trade, IV. Resorts to Violence, VI. Seizing Munitions, VII. War Embargoes, VIII. Disturbing Diplomats, IX. Passports, X. Counterfeiting, XI. Misuse of the Mails.

In 1938 (52 Stat. 63) Congress decided that propagandists should tell their neighbors who the foreign principals were for whom they were working, but just why the printers ever regarded this as something to be attached to the Don't Disturb Diplomats Act it is now impossible to discover.

In 1939 the law designated 53 Stat. 1244 was passed while we were still in the pre-war era of appeasement. Congress improved these new Be-Honest-About-Your-Retainer regulations, but obviously these amendments were not aimed at people who were Disturbing-Diplomats or were engaged in operating as spies or in counter-espionage activities.

In 1940, during the "phony peace" or "sleeping war" periods, Congress increased the peacetime punishment for a widely assorted set of acts (see 54 Stat. 78-80).

Finally, in 1942, Congress enacted the Foreign Agents Registration Act, 56 Stat. 248, 256, further elaborating the 1938 purposes and principles, but these new provisions show even more clearly the basic distinction between their purpose and that of the 1917 Act concerning diplomats and consular agents.

The accused, advised by an attorney inexperienced in criminal procedure and even more uninformed as to ideological issues and freedom of expression and association than those who drafted the indictment, was persuaded to believe that serving food and drink to customers whom the FBI was trailing was in violation of some registration

statute, and so he pleaded guilty, not to any act of espionage, but to the non-registration charge, which he was assured, and correctly so, was then a relatively minor statutory violation.

The trial of those who refused to take the indictment seriously dragged on into the Pearl Harbor period, and phrases and clauses which this petitioner, Mr. Eichenlaub, either never read or could not have understood the latent meanings of, were used to build up the case in the minds of the press and the public, as well as of the trial jury, as a spy case, thereby cutting clear away from the old Section 233 and going indeed far beyond the new Section 601 into matters of espionage, sabotage and other related charges, all of which subsequently affected the treatment this petitioner received. The sentence, the commitment, the subsequent detention of, and control exercised over, the petitioner have all been improperly affected by the unfair and unwarranted espionage and spy innuendoes and charges levelled against him.

POINT III

Even prior to the rule of the *Heine* case the petitioner's plea to the first count of the July, 1941 indictment clearly did not imply guilt of espionage, for acts against this nation's official guests (diplomats, consuls, etc.) however rude or prohibited are entirely distinct from spying.

Although the petitioner was persuaded to plead guilty, the nature of the offense which he committed and whether it makes him an undesirable resident within the meaning of the Act of 1920 cannot be fairly determined without regard for the decision of the Circuit Court of Appeals on the appeal of one of his co-defendants (*U. S.* v. *Heine*, 151 F. (2d) 813), which in effect pulls the props from under the indictment.

The theory of the prosecution both in presenting the case to the Grand Jurors and to the Trial Jurors was that it was unlawful to send abroad information which it was lawful to broadcast and distribute throughout this country.

The trial jury, which deliberated at one of the most hysterical periods of our history, when the President had just proclaimed an emergency and the imminent danger of a foreign invasion, or predatory incursion, accepted this theory of the prosecution, and it was not until November 8, 1945 that in the well-reasoned *Heine* case opinion by the Honorable Learned Hand of the Circuit Court of Appeals, Second Circuit, the fallacy of the basic premise of the prosecution was announced. This rule of the *Heine* case reversed the second and main count of the indictment, stating that "whatever was lawful to broadcast throughout the United States was lawful to send abroad" and warned (with respect to the section of the law under which this petitioner and the other defendants were indicted) that "so drastic a repression of the free exchange of information, it is wise carefully to scrutinize, lest extravagant and absurd consequences result."

The Circuit Court was convinced from the evidence that Mr. Heine had been an employed agent for foreign principals, and should have registered and kept the State Department advised of his activities, but it also pointed out that his course was surreptitiously adopted in order to escape detection and that he misled his correspondents as to his motives.

It is respectfully submitted, therefore, that under the rule of the *Heine* case, both as to his guilt on the lesser count and as to his innocence on the more serious count, this petitioner Eichenlaub should be cleared of any shadow of criminal guilt, since all he was accused of doing was to associate as a restaurateur with customers whose activities were entirely lawful, or unlawful only in the fact that they were not disclosed either to the Secretary of State or to such casual acquaintances as the proprietors of the restaurants they frequented.

Mr. Eichenlaub has served his sentence which the Trial Judge fixed at a relatively short period, and the idea that there is a continuing after-effect bringing him within the group of criminally undesirable residents is repugnant not only to the law as it now appears, but to the sense of proportion which the Court had in mind in imposing some short and some long sentences in that case.

The petitioner expected, when he pleaded guilty, that he would receive a suspended sentence and, if it is recalled that the plea was taken during an era of peace, when this country was not at war, there is no reason to suspect that the attorney who advised him was then unduly optimistic in encouraging this expectation. Although his plea was entered early in September, 1941, the sentence with respect to all of the accused—those who pleaded guilty and those who stood trial—was not imposed until after the termination of the trial. The events at Pearl Harbor occurred just prior to the conviction of the fourteen co-indictees who stood trial and whom the jury found guilty on December 12, 1941. Thereafter both those who pleaded guilty and those who were deemed guilty by the jury were sentenced on January 2, 1942.

Now that the heat of the war hysteria has passed and the well-reasoned rule of the *Heine* appeal prevails, it is crystal clear that this petitioner was never charged with anything amounting to a crime, and that he is detained only because his poverty prevented him from the timely retainer of counsel to prepare and present an appeal record for informed review by the higher courts.

POINT IV

The judgment of denaturalization is void for the reason that Section 738 of Title 8, U. S. C., does not provide for the revocation of naturalization by consent.

The petitioner, Richard Eichenlaub, was lawfully admitted into the United States in February, 1930, and admitted to full citizenship on November 17, 1936. This country was his permanent domicile and chosen allegiance years before there were Nazis. Seven years after petitioner's final naturalization a proceeding was brought to cancel his citizenship on the ground that he had procured it by fraud, and on January 25, 1944, upon the consent of the petitioner, a judgment was entered in the United States District Court for the Southern District of New York without his appearing before the Court or any judicial injury being had. The petitioner has made a direct attack upon the validity of this judgment of denaturalization in the same Court, but that motion has been denied. An appeal from the District Court's decision has been taken to the Circuit Court of Appeals for the Second Circuit and is now pending.

Section 738 of Title 8, U. S. C., which may be referred to as the revocation statute, provides:

> "(a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured."

"(e) When a person shall be convicted under this Act of knowingly procuring naturalization in violation of law, the court in which such conviction is had shall thereupon revoke, set aside, and declare void the final order admitting such person to citizenship, and shall declare the certificate of naturalization of such person to be canceled. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense to make such adjudication."

Subsections (a) and (e) of Section 738 plainly speak of a trial and conviction but in the instant case there was no trial. It was brought at the height of the war and before the protective decision of *Baumgartner* v. *United States*, 322 U. S. 665, requiring clear proof in such cases. The petitioner was persuaded, or in effect forced, to consent to cancellation of his naturalization, rather than contest the proposed allegations of the Government's complaint. Neither Section 738 nor any other section provides for the entry of such a consent decree.

The wisdom of limitations in denaturalization cases is aptly demonstrated in the case of *United States* v. *Jackson* (D. C., Mich., 1944), 55 F. Supp. 517, where the Court said that such a suit, though not a "criminal proceeding" is not an ordinary "civil action" since it involves an important adjudication of *status*, and, hence, the Government should be limited, as in a criminal proceeding, to matters charged in the complaint.

And in the case of *United States* v. *Wezel* (D. C., Ill., 1943), 49 F. Supp. 16, it was held that an action to set aside citizenship is an "action in equity", but the defendant is entitled to the rule of law which requires that a man shall be proved guilty beyond a reasonable doubt before he should be so found.

POINT V

The judgment of denaturalization is void for the reason that said judgment does not comply with the Rules of Civil Procedure.

Rule 55 of the Federal Rules of Civil Procedure provides as follows:

> "Subsection (b). Judgment by default may be entered as follows:
>
> (1) *By the Clerk.* When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.
>
> (2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States."

A cancellation proceeding is equitable in character, and it was necessary according to the Rule to establish in the instant case the truth of any averment by evidence in order to enable the Court to enter judgment or to carry it into effect.

This proceeding was based upon fraud and the fraud must be proved before judgment is entered. In the instant case no proof was offered and no evidence was presented to the Court before the judgment was entered.

In the case of *United States* v. *Polzin*, 48 F. Supp. 476, the Court, on page 480, said:

> "However, we have no right to cancel citizenship upon mere speculation. *There must be satisfgctory proof of fraud or illegality at the time citizenship was granted, because, as the statute now reads, it is only in such instances that citizenship can be taken away.*"

In the case of *United States* v. *Bergman*, 144 F. (2d) 34, the Circuit Court held that citizenship once granted should not be revoked except on "positive proof of fraud". Allowance should be made if statements were made in the heat of passion or partisan debate.

In the case of *United States* v. *Heymig*, 50 F. Supp. 566, a denaturalization proceeding, the Court, on page 567, stated:

> "From these excerpts from decisions in other Federal courts it seems clear that the rule not only should be, but is, that evidence of fraud must be clear and convincing to a degree that it satisfies the mind of the court of the truth of the charges, *beyond a reasonable doubt.*"

POINT VI

A proceeding to cancel a certificate on the ground of fraud is a suit in equity and the burden of proof is on the prosecution to establish and prove its case.

A court order or judgment is presumed to be valid. There is, therefore, a presumption of validity of an order admitting a person to citizenship. All courts seem to agree upon the fact that the burden of proof is upon the prosecution to sustain its charges that the order and certificate were fraudulently or illegally procured.

In the case of *United States* v. *Fischer* (D. C., Fla., 1942), 48 F. Supp. 7, it was held that a suit for cancellation of a certificate of citizenship fraudulently or illegally procured is a statutory proceeding in which resort is had to general principles of equity.

In the case of *United States* v. *Sharrock*, 276 Fed. 30, which was an action to revoke and set aside an order and cancel the defendant's certificate of citizenship, the Court, in the opinion, says:

> "To deprive a man of his priceless possession of an inestimable right to American citizenship, there must be full proof. Nothing will warrant cancellation of citizenship but clear, unequivocal and convincing evidence that in quantity and quality inspires confidence and produces conviction of the truth of the charge virtually beyond reasonable doubt."

In the case of *United States* v. *Rovin*, 12 F. (2d) 942, the Court, in its opinion, announced that the burden is upon the Government to prove fraud by preponderance of the evidence. Fraud is not to be lightly inferred, but must be established by clear and convincing evidence.

In another case, *United States* v. *Ebell*, 44 F. Supp. 43, the Court held that an order of naturalization is not to be lightly set aside unless it is clearly shown by a preponder-

ance of completest evidence that the order and certificate had been secured by fraud.

In *United States* v. *Der Manelian*, 39 F. Supp. 959, to set aside the order and cancel the certificate of citizenship it was held that the burden was upon the prosecution to prove fraud *by a preponderance* of the evidence.

In *United States* v. *Hartman* (D. C., Pa., 1943), 51 F. Supp. 394, it was held that citizenship once conferred should not be taken away without the clearest justification and proof.

Since a cancellation proceeding is equitable in character, and not criminal, the same rules as to burden of proof and weight of evidence apply, as in actions generally to revoke and set aside a judgment.

POINT VII

In a proceeding to cancel a certificate of naturalization on the ground of fraud the Government must present evidence of a clear, unequivocal and convincing nature.

In the case of *Schneiderman* v. *United States*, 320 U. S. 118, which was an action to cancel a certificate of citizenship on the ground that it was fraudulently procured, it was held that the burden of proof must be met with evidence of a clear and convincing character in accordance with strict legal requirements.

In the case of *United States* v. *Schuchardt* (D. C., Ind., 1943), 49 F. Supp. 567, which was an action to revoke an order admitting defendant to citizenship and to cancel a certificate of naturalization on the ground of fraud, that Court also held that the Government must prove fraud by clear and satisfactory proof.

Similarly, in the case of *United States* v. *Orth* (D. C., S. C., 1943), 51 F. Supp. 683 (reversed on other grounds), the Court held that the Government had the burden of

proving its essential allegations by clear, unequivocal and convincing evidence. And in the case of *United States* v. *Scheurer* (D. C., Ore., 1944), 55 F. Supp. 243, it was held that to set aside a naturalization proof must be full, clear and convincing.

In *Baumgartner* v. *United States* (1944), 64 Sup. Ct. 1240, it was held that the statutory proceeding for naturalization was designed to afford cumulative protection against fraudulent or illegal naturalization, but relaxation in the vigor appropriate for scrutinizing intensity of allegiance to the United States embraced by an applicant before admitting him to citizenship is not to be corrected by meager standards questioning such allegiance retroactively.

In *Bergman* v. *United States*, 144 F. (2d) 34, *supra*, it was said:

> "We cannot escape the conviction that the case made out by the Government lacks that solidity of proof which leaves no troubling doubt in deciding a question of such gravity as is implied in an attempt to reduce a person to the status of alien from that of citizen."

In the instant case the failure of the Government to present evidence of a clear, unequivocal and convincing nature that petitioner fraudulently procured his naturalization certificate is patent.

POINT VIII

The Court lacked jurisdiction to enter a judgment of denaturalization.

Neither New York State laws nor any rule or statute of the United States delegates jurisdiction to the Courts to enter a judgment by consent upon a claim arising out of tort or fraud.

In the case at bar the Court entered judgment as though on consent, but there cannot be any judgment by consent without a written admission of facts alleged in the complaint.

At best, therefore, the defendant consented to the entry of a void judgment.

It is a serious question whether the Congress ever intended that the safeguards thrown around the citizen by present laws and regulations might be waived by a so-called consent.

POINT IX

The petitioner's conviction was not the conviction of an alien within the meaning of the Act of 1920.

The Government contends that the rule of retroactivity of cancellation of citizenship operates in effect to make petitioner an alien at the time he was convicted in 1941 and thus brings him within the 1920 Act. It is submitted that the rule of retroactivity cancellation has never been and should not be applied in so extreme and harsh a manner. The reference by Congress in the 1920 Act to aliens certainly was not intended to include naturalized citizens who might subsequently have their naturalization cancelled, especially where, as here, the citizenship status was not only conceded in the non-registration as a propagandist associate proceedings but the jurors who convicted and the judge who sentenced heard the prosecutors stress and repeatedly emphasize such citizenship.

In *Delgadillo* v. *Carmichael* (Oct. Term, 1947, No. 63) the Supreme Court pointed out that it was a capricious application of immigration laws to hold that every technical "entry" of an alien into the United States was an entry within the meaning of the statutory provision permitting deportation for crimes committed prior to entry. *A fortiori*, it is a capricious application of the Act of 1920 to treat as a convicted-alien a convicted-citizen-subsequently-denaturalized.

POINT X

Under proper circumstances a judgment cancelling citizenship can be vacated and set aside, and time should not act as a barrier in the instant case.

In the recent case of *United States* v. *Geisler*, 9 F. R. S., 60 B. 51, involving a cancellation of defendant's certificate of citizenship, a period of almost four years had elapsed between the entry of a *consent* judgment and the application to set it aside, yet the judgment was set aside by the District Court.

In the case of *Rene de Meerle* v. *People of the State of Michigan*, Supreme Court Law Ed., Advance Opinions, Vol. 90, No. 7, P. 47, which was reversed, and the recent case of *Tony Marino* v. *Joseph E. Ragen*, reported in Vol. 92, No. 5, Supreme Court Law Ed., Advance Opinions, page 203, in which case the judgment below was vacated and the case remanded, a period of approximately fifteen years had elapsed before the first case was brought to this Court, and a period of twenty-two years had elapsed before the second case reached the Supreme Court, but both were reviewed and the convictions were held to have been in violation of those petitioners' constitutional rights.

It is respectfully contended that the instant case involves a similar abridgement of constitutional rights, and is therefore one that merits review by this Court.

There can be no doubt but that under proper circumstances a judgment cancelling citizenship can be vacated and set aside, and time should not act as a barrier in justifiable cases.

Again, too strong emphasis cannot be placed on the fact that the education of the relator is meager. His understanding of the English language itself is limited. He had been employed for ten months in defense work and his wife was working, and he insistently contends that he signed the consent believing that if he contested the case

the Government would regard him and his wife as recalcitrants and make a *permanent* court record of his denaturalization, whereas, if he consented, the effect would merely be a *suspension* of citizenship privileges for the duration of the war.

No claim is made that he was ever informed or advised of his constitutional rights or any possible interrelationship of what he was signing, with his right of domicile or deportability. Where under the stress and necessities of war conditions errors of officials and mistakes of individuals result in hardships on persons long domiciled here, the Government should be slow to afflict and quick to make retribution, neither reluctant nor evasive in correcting wrongs inflicted upon citizens, since a forthright recognition of injustice is the surest means of maintaining faith and confidence in our system of law. *Abo* v. *Clark*, 77 F. Supp. 806.

There is no question but that the war's hysteria affected even before Pearl Harbor the procedural and substantive rights of all persons prosecuted in so-called "criminal" or "civil" proceedings because of their sympathies for this or that foreign country or because of their associations and expressions of opinion on controversial domestic or foreign policies.

In the light of the numerous recent decisions reversing what some courts have not hesitated to call harshly arbitrary and capricious judgments and determinations, the petitioner should certainly be given time to fully present his case for review or to vacate the two war-ideology judgments against him, his "confession" of non-registration or associating with unregistered propagandists and his "consent" to surrender of citizenship.

As was so well stated in the majority opinion in *Madeiros* v. *Watkins*, 166 F. (2d) 897, at page 900, the strictest proof is required if the determination will result in severing one from his home, business and all present connections.

POINT XI

The warrant of deportation contains no lawful ground of deportation.

The warrant of deportation (R. 2) states that appellant is deportable in that he has been found to be a member of the undesirable classes of alien residents enumerated in "the" Act of 1920. But the Act requires that a finding be made not that the individual is a member of the undesirable classes but that a member of the described classes is individually an undesirable resident. In *Mahler* v. *Eby*, 264 U. S. 32, the Supreme Court of the United States decided this precise question and held that a new deportation hearing was required although this question was first raised in that Court.

The point that remanding this case is no mere formality is indicated by the facts which must be considered in making a specific finding that the appellant is an undesirable resident. The petitioner has a wife in this country. There is no indication that the petitioner at any time prior to, or at the time of taking the oath of allegiance to the United States, had been guilty of any act of disloyalty or hostility to this country. Nor is there any evidence or intimation, except for the so-called non-registration matter and this controversy of citizenship, that the petitioner has at any time run afoul of any Federal, State or Municipal authority.

The petitioner has been advised by counsel that he has meritorious grounds for moving to vacate both the non-registration propaganda conviction and the denaturalization judgment, but even if both remain records of the Court, the proposition that he is a German or an undesirable alien, subject to deportation, is completely unsupportable in law and contrary to clearly established and sound precedents. Whether or not Mr. Eichenlaub succeeds in regaining his citizenship status, he is definitely not a German,

although on the basis of the present record he seems to be a stateless man without a national sponsor. In *In re Steinworth*, 159 F. (2d) 50, the Court held that German citizenship is not restored by cancelling Costa Rican naturalization.

Before this issue of Right of Domicile and Citizenship status can be determined, judicial review or trial should be had for the reasons so well expressed in Judge Frank's dissenting opinion in *Madeiros* v. *Watkins*, 166 F. (2d) 897, at pages 900-904.

As Judge Goodman pointed out in his first opinion in *Abo* v. *Clark* (that of June 30, 1947, 76 F. Supp. 664 at 667), an "expatriation" proceeding at most only terminates rights of American citizenship and "in no way fixes or determines any particular alien nationality for the expatriate". The clarity of Judge Goodman's decision probably stems from the fact that he calls things by their real names and "expatriation" is not confused with "repatriation".

Until recently no Attorney General had ever claimed that the 1798 Act was an authority to "punish" individuals without trial, and if hardship to an individual resulted from "protecting" the public, the injury was certainly no greater than drafting men for military service. Since, however, the recent policy of "transplanting" civilians long domiciled here *into* slave camps in foreign war zones under pretext of "removing" them *from* the United States, an entirely different series of questions arise. The duty of care a federal detainer has is not discharged by forcibly releasing his charges in danger beset or army occupied areas and if Sections 428, 443, 446 of Title 18, U. S. C., mean anything, such transporting into the jurisdiction of peon oppression governments is most unlawful.

In reviewing the law applicable to the facts of this case, and the cases of those similarly situated (for the sufficiency of the indictment referred to above affects a number of other persons and will be judged by the ultimate

ruling herein), it is evident (1) that the petitioner did not commit the crime of which he had pleaded guilty; (2) that the judgment of denaturalization was a nullity because the petitioner was denied his constitutional rights; (3) that except as noted above, the petitioner during the past eighteen years of his residence in this country has not run afoul police authorities; and (4) that deportation would result in "serious economic detriment" to his wife and would work irreparable hardship upon him, entirely out of proportion to any offense he may have unwittingly committed, as has hereinbefore been stated.

For the foregoing reasons we respectfully and sincerely urge that the writ of certiorari should issue.

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APPENDIX I

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 254—October Term, 1947.

(Argued April 14, 1948 Decided May 3, 1948.)

Docket No. 20965

UNITED STATES OF AMERICA, *ex rel.*
RICHARD EICHENLAUB,
Relator-Appellant,

—v.—

W. FRANK WATKINS, as District Director of Immigration and Naturalization, etc.,
Respondent-Appellee.

Before:

SWAN, CLARK and FRANK,
Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York dismissing a writ of habeas corpus. Affirmed.

HAROLD K. MCKEE, *for appellant;*

JOHN F. X. MCGOHEY, *United States Attorney for the Southern District of New York* (John F. Ryan, of counsel) *for appellee.*

Eichenlaub, the relator, entered the United States in 1930 and was naturalized in 1936. In 1941, he was convicted of the crime of having conspired to act as an agent for a foreign government without having registered. The indictment referred to 22 U. S. C. A. §233. By the Act of March 28, 1940, §233 had been amended so as to increase the penalty;[1] it now appears as 22 U. S. C. A. §601. The Act of May 10, 1920,[2] provides in part: "* * * That aliens of the following classes, in addition to those for whose expulsion from the United States provision is made in the existing law, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported in the manner provided in sections 19 and 20 of the Act of February 5, 1917, entitled 'An Act to regulate the immigration of aliens to, and the residence of aliens in, the United States,' if the Secretary of Labor, after hearing, finds that such aliens are undesirable residents of the United States, to wit: * * * (2) All aliens who since August 1, 1914, have been or may hereafter be convicted of any violation or conspiracy to violate any of the following Acts or parts of Acts, the judgment on such conviction having become final, namely: (a) An Act entitled 'An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes,' approved June 15, 1917, or the amendment thereof approved May 16, 1918; * * *" On January 25, 1944, in denaturalization proceedings in the district court for the Southern District of New York, a decree was entered which cancelled relator's certificate of naturalization. Subsequently, administrative

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[1] 54 Stat. 80.

[2] 41 Stat. 593, 594. Under the authority of 1940 Reorg. Plan No. V, 54 Stat. 1238, "Attorney General" is substituted for "Secretary of Labor." The Act is codified in 8 U. S. C. §157; the words of the statute are, of course, controlling.

deportation proceedings were begun against him. He was arrested and given an administrative hearing. In those proceedings, a finding was made that he "is an undesirable resident of the United States." On October 9, 1945, a warrant of deportation was issued which stated in part the following: "Whereas, after due hearing * * * an order has been duly made that the alien Richard Eichenlaub * * * is subject to deportation under the following provisions of the laws of the United States, to wit: The Act approved May 10, 1920, in that he has been found to be a member of the undesirable classes of alien residents enumerated in said Act, to wit, an alien who since August 1, 1914 has been convicted of conspiracy (18 U. S. C. 88) to violate an Act entitled 'An Act to punish acts of interference with the foreign relations * * *' approved June 15, 1917 (22 U. S. C. 233)." Relator brought habeas corpus proceedings. From an order dismissing the writ he appeals.

FRANK, *Circuit Judge*.

Relator contends that 22 U. S. C. A. §233 was repealed and that therefore he was not convicted of any crime enumerated in 8 U. S. C. A. §157. We cannot agree; the 1940 Act did not repeal but merely increased the penalty prescribed in 22 U. S. C. A. §233.[3] Nor do we agree with his contention that 8 U. S. C. A. §157 does not include one who was a citizen when convicted but who is subsequently denaturalized. We think the decree of denaturalization relates back, at least for this purpose. Cf. *Rosenberg* v. *United States*, 60 F. (2d) 475 (C. C. A. 3).

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[3] If he means to contend that the indictment was insufficient, the contention is frivolous. As the court in the criminal suit had jurisdiction of both his person and the subject matter, he cannot, in a habeas corpus proceedings, attack the conviction.

He also urges that the deportation warrant is defective, as not in accord with 8 U. S. C. A. §157, since it states that he is "a member of the undesirable classes of alien residents enumerated in said Act" and does not state that he, as an individual, has been found to be an "undesirable resident." He cites *Mahler* v. *Eby*, 264 U. S. 32. But there the Court said (p. 43) that the defect in the warrants had not been met by other matter in the record. Here we have an explicit finding in the administrative proceedings that relator "is an undesirable resident." It would serve no useful purpose to remand to permit amendment of the warrant to conform to that finding.

Affirmed.